



The State of New Hampshire
Department of Environmental Services



Michael P. Nolin
Commissioner

April 26, 2006

The Honorable Joseph D. Kenney
Senate Executive Departments and Administration Committee
LOB 102
Concord, NH 03301

Re: HB 1523, relative to certain rulemaking authority of the commissioner of environmental services

Dear Senator Kenney and Members of the Committee:

Thank you for the opportunity to comment in support of HB 1523, relative to certain rulemaking authority of the commissioner of environmental services. The Department of Environmental Services requested this bill to address concerns raised by the Legislative Budget Assistant ("LBA") as a result of the audit of the Department that was conducted last year.

In its audit report, the LBA identified 11 statutory provisions that conferred rulemaking authority on the Department that the LBA asserted were both mandatory and unfulfilled. In reviewing the LBA's findings, we reached conclusions about the utility of the different provisions that are reflected in HB 1523 as follows:

Section 1: The rulemaking authority under RSA 146-C:12, I, is not needed; funds are not distributed outside the agency, so it makes more sense to rely on the federal requirements already applicable to the Department. The Department is requesting that the language be modified as shown to reflect this.

Section 2: The rulemaking authority under RSA 146-D:5-a, II is not needed. (The Department did have rules at one time but did not readopt them per advice received from the AGO.) Statutory provisions already exist setting forth competitive bidding requirements, so it makes more sense to have those provisions referenced here. The Department is requesting that the language be modified as shown to reflect this.

Sections 3 and 4: The rulemaking authority under RSA 149-M:30, II (second sentence) is not needed; the priority ranking system identify in this paragraph is already in paragraph I of the same section, and the requirement to use it is clearly spelled out in the first sentence of paragraph II. The Department thus is requesting that the second sentence be deleted. The rulemaking authority under RSA 149-M:7, XII for the cleanup of waste sites was not identified by the LBA but is duplicative of the authority under RSA 149-M:30, II and so likewise is not needed.

Section 5: Rules under RSA 486:10 relative to certifying operators of private wastewater pretreatment facilities are not needed at this time and the Department does not have the resources at this time to implement the program contemplated by the provision. However, the Department believes that the program may, in the future, be needed, and so is requesting to preserve the authority but in non-mandatory form (*i.e.*, change "shall" adopt rules to "may" adopt rules).

Section 6: Rules under these statutory provisions are not needed (as discussed below), so the Department is requesting that the provisions be repealed:

- I. RSA 149-N, relative to the recycling logo: It has been the Department's experience that if matters of this type (use of the recycling logo) are to be regulated, then they need to be regulated on a consistent regional (or national) basis so as to not convert the State's boundaries to product barriers. That is, without consistent regional/national regulation, the likely effect of attempting to regulate the use of the recycling logo in New Hampshire would be that New Hampshire citizens would have fewer choices of products. Of the two organizations mentioned in RSA 149-N:4, II (with whom the Department is supposed to be coordinating standards), the Northeast Recycling Council (of the Council of State Governments) is not doing anything in this area and the Northeast Source Reduction Council of the Coalition of Northeast Governors is now defunct.
- II. RSA 339:71-76, relative to the use of plastic rings as packaging for bottles and cans: The issue addressed by these provisions is the use of plastic rings as a packaging technique, which is now regulated federally. Consistent with Department testimony in 1995 (on a proposed amendment to the statute), the provisions are unnecessary. In any event, the Legislature has not provided the resources (funds, positions) necessary for this program to be implemented since its original enactment in 1989.
- III. RSA 486:2, relative to adopting rules to require regional wastewater treatment plants: This was originally enacted in the early 1970s in response to EPA requirements under the Construction Grants program, which no longer exists. In any event, the Department believes there are better ways to encourage regional treatment plants (if desirable) than by adopting rules to require it.
- IV. RSA 487:5, relative to rulemaking to control marine pollution and aquatic growth: This is a very broad delegation of rulemaking authority that is not needed, as the provisions of RSA 487:1-14 (to which this language originally applied) are self-executing. The later sections of the chapter relative to exotic aquatic weeds have separate, more specific, rulemaking authority.

Please note that of the three provisions identified by the LBA that are not included in the above discussion, rules under RSA 486-A:8, III were already in process at the time of the audit and have now been adopted,¹ rules under RSA 487:18 are part of a rulemaking that is scheduled to be completed by the end of August,² and rules under RSA 483-A:7, II are still currently under development.

Thank you for your consideration of these comments. If you have any questions, please contact Gretchen Hamel, Legal Unit Administrator, at 271-3137 or ghamel@des.state.nh.us.

Sincerely,



Michael P. Nolin
Commissioner

cc: Representative Betsey Patten

¹ Env-Ws 393, effective November 30, 2005.

² Env-Wq 1300; Rulemaking Notice published on April 14, 2006 (NN 2006-48).